

APPEAL NO. 161788  
FILED NOVEMBER 15, 2016

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 27, 2016, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that the compensable injury extends to a left knee partial thickness vertical split tear and microtrabecular fracture disruption; that the respondent (claimant) had not reached maximum medical improvement (MMI) as of February 4, 2016, the date of the examination by (Dr. H), a referral of the claimant's treating doctor; that because the claimant has not reached MMI, the impairment rating (IR) cannot be determined; and that the claimant had disability resulting from the compensable injury beginning on November 4, 2015, and continuing through the date of the CCH.

The appellant (carrier) appealed the hearing officer's decision arguing that the evidence fails to establish that the claimant has either a partial thickness vertical split tear or a microtrabecular fracture disruption of her left knee and arguing further that the hearing officer's findings regarding MMI, IR and disability are contrary to the great weight and preponderance of the evidence. The carrier also attached a report of left knee MRI testing post arthrogram performed subsequent to the CCH on August 18, 2016, for consideration as newly discovered evidence.

The appeal file does not contain a response from the claimant.

DECISION

Affirmed as reformed.

The claimant was injured on (date of injury), when she tripped while stepping up to a crane mat and fell, landing on both knees. The parties stipulated that the claimant sustained a compensable injury on (date of injury), and that the carrier has accepted as compensable a left knee contusion.

**NEWLY DISCOVERED EVIDENCE**

Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. See *generally*, Appeals Panel Decision (APD) 091375, decided December 2, 2009; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In determining whether new evidence submitted with an appeal or response requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the

hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. See APD 051405, decided August 9, 2005. The carrier submits for the first time on appeal the report of an August 18, 2016, MRI Knee Left With Contrast Post Arthrogram requested by the claimant's treating doctor, (Dr. D). We do not agree that the documents submitted by the carrier for the first time on appeal meet the requirements for newly discovered evidence. Indeed, evidence admitted at the CCH reveals that Dr. D requested the left knee arthrogram in March 2015, and that the carrier denied the preauthorization request on June 25, 2015. The report of the arthrogram testing results could have been obtained prior to the CCH had the request for such testing not been denied by the carrier. Such report was, in part, cumulative of other evidence admitted at the CCH, and was not so material that it would probably result in a different decision. Therefore, the document attached to the carrier's appeal was not considered by the Appeals Panel.

### **EXTENT OF INJURY**

The hearing officer's determination that the compensable injury of (date of injury), extends to a left knee partial thickness vertical split tear and microtrabecular fracture disruption is supported by sufficient evidence and is affirmed.

### **MMI/IR**

The hearing officer's determinations that the claimant had not reached MMI as of February 4, 2016, the date of Dr. H's examination, and that, for such reason, the IR cannot be determined, are supported by sufficient evidence and are affirmed.

### **DISABILITY**

The hearing officer's determination that the claimant had disability resulting from the compensable injury from November 4, 2015, though the date of the CCH as reflected by Conclusion of Law No. 6 and the Decision section of the Decision and Order is supported by sufficient evidence and is affirmed; however, the hearing officer mistakenly indicated that the period of claimed disability began on August 4, 2015, in his Finding of Fact No. 8 and in the Discussion section and initial paragraph of the Decision and Order. The disputed disability issue before the hearing officer was:

4. Did [the] [c]laimant have disability resulting from the compensable injury from November 4, 2015, through the present?

The hearing officer's Finding of Fact No. 8 is inconsistent with the disability issue certified for dispute resolution, the hearing officer's Conclusion of Law No. 6, the

Decision and the evidence admitted. We therefore reform Finding of Fact No. 8 to read as follows:

8. As a result of the compensable injury, [the] [c]laimant was unable to obtain and retain employment at wages equivalent to her pre-injury wage for the period beginning November 4, 2015, and continuing through the date of the hearing in this matter.

We further reform the initial paragraph of the Decision and Order to read as follows:

This case is decided pursuant to Chapter 410 of the Texas Workers' Compensation Act and the Rules of the Texas Department of Insurance, Division of Workers' Compensation. For the reasons discussed herein, the hearing officer determines that the compensable injury of (date of injury), extends to and includes left knee partial thickness vertical split tear and microtrabecular fracture disruption; Claimant has not reached [MMI] and because she has not reached [MMI], the IR cannot be determined at this time; and the claimant had disability resulting from the compensable injury from November 4, 2015, through the present.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
211 EAST 7TH STREET, SUITE 620  
AUSTIN, TEXAS 78701-3218.**

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K. Eugene Kraft  
Appeals Judge

CONCUR:

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Carisa Space-Beam  
Appeals Judge

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Margaret L. Turner  
Appeals Judge